Supreme Court, U.S.
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No. 041343

In The

Supreme Court of the United States

SHIRLEY McLAURIN, Individually and on Behalf of the Heirs of Milton Stubbs, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a doctor in a medical negligence case who worked at a federally funded clinic (but treated a patient at a local hospital and had his own malpractice insurance) waived his right to claim "federal employee" status when the doctor waited over six (6) years to report a claim to his supervisor. The answer to this question would determine the subsequent question whether the action was then properly removed, deemed to be covered by the Federal Torts Claims Act and dismissed for failure to exhaust administrative remedies.

PARTIES TO THE PROCEEDING

Petitioner: Shirley McLaurin, and heirs of Milton Stubbs (Leola Stubbs – widow; and Shirley McLaurin, Annie Vaughn, Hosea Stubbs, Jimmy Stubbs, R.D. Stubbs, Mamie Harper, Gracie Baker, Doretha Baker, Emma Harper, and Charles Stubbs).

Respondent: United States of America and Dr. Saad Khan

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PETITION FOR WRIT OF CERTIORARI

Shirley McLaurin, on behalf of herself and the heirs of Milton Stubbs, Petitioner, respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS ENTERED IN THIS CASE

The Order of U.S. District Judge Charles W. Pickering, *Shirley McLaurin, et al. v. United States of America,* February 11, 2004 denying remand and dismissing case is unreported. The Fifth Circuit Opinion affirming the District Court's opinion is reported at *Shirley McLaurin, et al. v. United States of America,* 392 F.3d 774 (5th Cir. Dec. 2, 2004). The Fifth Circuit Order denying Appellant's Petition for Rehearing, January 7, 2005, is unreported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgement on the Petitioner's appeal on December 2, 2004 and denied Petitioner's Petition for Rehearing and Rehearing En Banc on January 7, 2005. While Petitioner challenges the removal of this action and thus, the jurisdiction of the federal courts, Respondent invoked jurisdiction to remove this case pursuant to 28 U.S.C. §2679(d)(2). Petitioner invokes the jurisdiction of this Court pursuant to Supreme Court Rule 10(c). The Court of Appeals' decision in this matter conflicts with holdings of other federal courts, is a clear misapplication of a properly stated rule of law, and presents compelling

reasons for clarification of the duties of purported federal employees to report suits against them in a timely manner.

STATEMENT REGARDING CONSTITUTIONAL PROVISIONS AND STATUTES

This case does not directly involve any federal constitutional provisions but does involve the following federal statutes:

*Federal Tort Claims Act, 28 U.S.C. §§2671-2680

*Federally Supported Health Centers Assistance Act, 42 U.S.C. §233 and regulations promulgated found at 28 C.F.R. §15.1. *Expeditious Delivery of Service of Process and Pleadings*, §15.2 *Providing Data on Scope of Employment or Program Participation Status;* §15.3 *Removal and Defense of Suits*

(7-1-02)

STATEMENT OF THE CASE

Proceedings Below

On November 14, 1996, Mrs. McLaurin filed suit on behalf of herself and Milton Stubbs' heirs in the Circuit Court of Forrest County, Mississippi, alleging medical negligence that resulted in the wrongful death of Mr. Stubbs against Forrest General Hospital, Dr. Saad Khan, and others. Dr. Khan was served with process in 1996. Dr. Khan retained counsel and during discovery provided proof of private malpractice insurance coverage.

Trial in the case commenced on July 29, 2002, in the Circuit Court of Forrest County before Judge Michael Eubanks as to Mrs. McLaurin's claims against Dr. Khan.[1] A jury pool was convened and it was only after arguments and rulings on motions in limine, when Judge Eubanks took the bench and saw the Defendant Khan for the first time, that he realized that he had been treated by Dr. Khan in the past. Judge Eubanks recused himself and the jury panel was dismissed.

Thereafter, while the parties were attempting to secure a new trial date with a new judge, on August 11, 2002, almost six years after this suit was commenced and service of process completed on him, Dr. Khan first notified the United States Department of Health and Human Services (DHHS) that he had been sued by Mrs. McLaurin. He gave no notice to Mrs. McLaurin that he was seeking such status. He requested that he be certified an employee of the United States on the grounds that Sumrall Clinic where he had worked at the time received federal funds.

The DHHS deemed Dr. Khan an employee of the United States Public Health Service (USPHS) entitled to coverage under the FTCA and on October 16, 2002, referred the matter to the United States Attorney for the Southern District of Mississippi.[2] On February 18, 2003, the United States Attorney certified that Dr. Khan acted

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[1] Forrest General settled before trial and the named nurse defendants were also dismissed prior to trial.

[2] All these proceedings occurred without notice to Mrs. McLaurin.

within the scope of his office or employment at the time of the incident out of which this case arose and removed the case to the United States District Court for the Southern District of Mississippi pursuant to 28 U.S.C. §2679(d)(2).[3] Seven days later, on February 25, 2003, the United States was substituted for Dr. Khan as the defendant in the case. On March 18, 2003, Mrs. McLaurin moved for remand of the case to the Circuit Court of Forrest County, Mississippi. On April 7, 2003, the United States moved for dismissal of Mrs. McLaurin's claims on grounds of failure to exhaust administrative remedies.

By order entered February 11, 2004, the District Court denied Mrs. McLaurin's request for remand of this case to state court and dismissed her claims pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. Mrs. McLaurin filed her notice of appeal from the District Court's order on February 23, 2004. On December 2, 2004 a panel of the Fifth Circuit denied Mrs. McLaurin's appeal and on January 7, 2005, it further denied her petition for rehearing and rehearing en banc.

Material Facts

Mr. Stubbs, an elderly man who was experiencing chest pain, was taken to the emergency room at Forrest General Hospital (FGH) in Hattiesburg, Mississippi, on January 24, 1996. Because Mr. Stubbs was a patient of the

[3] The Notice of Removal was Mrs. McLaurin's first notice that any of this was going on and left her and her counsel totally baffled. A Motion to Substitute Parties was filed and an order entered by the Court less than ten days later – giving Mrs. McLaurin relatively no time to respond.

Family Health Center (FHC) in Sumrall, Mississippi, Dr. Saad Khan, who had just starting working at FHC and had never treated Mr. Stubbs, was called by the hospital to see him. After an initial assessment, Dr. Khan admitted Mr. Stubbs to the hospital, noting *inter alia* that Mr. Stubbs had a condition that might inhibit blood clotting. During the night, Mr. Stubbs fell in the bathroom in his room. The next morning, Dr. Khan observed a bump on Mr. Stubbs' head, but ordered no specific tests to assess the injury properly. Nor did Dr. Khan return to examine Mr. Stubbs again before his patient was discharged later that afternoon, although the discharge papers filled out by nurses at FGH noted the bump on Mr. Stubbs head, as well as a small puncture wound.

Two days later, Mr. Stubbs was brought back to FGH. He was disoriented, and Dr. Khan immediately ordered a CAT scan that revealed a subdural hematoma. Surgery was performed in an attempt to resolve it. However, further bleeding occurred and Mr. Stubbs died in January 1996.

His daughter, Shirley McLaurin on behalf of herself and other heirs filed a medical negligence suit against the hospital and Dr. Khan in November 1996. They had no claim against the Sumrall Clinic as no treatment had been dispensed there, and knowing Dr. Khan to be privately insured, they proceeded with suit against him, the hospital and nurses. At all times, Dr. Khan was represented by counsel.

ARGUMENT

I. THE REMOVAL OF THIS CASE PURSUANT TO 28 U.S.C. §2679(d)(2) WAS VOID DUE TO DR. KAHN'S FAILURE TO COMPLY WITH FEDERAL EMPLOYEE CERTIFICATION REQUIREMENTS.

The Fifth Circuit erred in permitting removal of this case over six years after it was commenced in Mississippi state court. Dr. Khan failed to give timely notice of this case to his superiors as required by federal regulations which resulted in a dilatory removal. To permit removal under the circumstances of this case is contrary to both the regulations and purpose of the FTCA and is grossly unfair.

A. The Federal Torts Claims Act Statute

Section 2679 of the FTCA provides that a suit against the United States is the exclusive remedy for damages for injury or loss of property "resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. §2679(b)(1). See also *Benton v. United States*, 960 F.2d 19 (5th Cir.1992); *Mitchell v. Carlson*, 896 F.2d 128, 134-35 (5th Cir.1990); *Insurance Co. of N. Am. v. United States Postal Serv.*, 675 F.2d 756, 757-58 (5th Cir.1982) (per curiam). This provision gives individual officers and employees of the United States acting within the scope of their employment absolute immunity against common-law tort claims. See *Lunsford v. Price*, 885 F.2d 236, 237-38 (5th Cir.1989); *Currie v. Guthrie*, 749 F.2d 185, 187-88 (5th Cir.1984) (per curiam); *Williams v. Collins*, 728 F.2d 721, 727 (5th Cir.1984). See also *Rivera v. United States*, 928 F.2d 592, 608-09 (2d

Cir.1991) (individual federal law enforcement agents were immune from suit on claims for common-law tort arising from agents' obtaining and executing warrants for search of apartments pursuant to 28 U.S.C. §2679, making suit against United States exclusive remedy for damages for injury or loss of property resulting from negligent or wrongful act or omission of any government employee acting within scope of office or employment).

B. Health Center employees may be covered by the Federal Torts Claims Act.

Under the Federally Supported Health Centers Assistance Act of 1995 ("FSHCAA"), Pub. L. No. 104-73, 109 Stat. 777 (codified at 42 U.S.C. §233), eligible community health centers and their employees are employees of the Public Health Service ("PHS") for certain purposes and may be certified as public employees under the Federal Torts Claims Act. In the case at hand, Petitioner had no cause of action against the Sumrall Health Clinic – only claims against Dr. Khan, who later sought federal employee certification.[4]

[4] The Secretary of Health and Human Services deems a community health center a PHS employer after the center has qualified for certain federal assistance. See 42 U.S.C. §233(g)(1)(A), (G). Once deemed a PHS employee, a community health center enjoys immunity from those acts that relate to its employment, and any actions against it are treated as actions against the United States. See 42 U.S.C. §233(a). See also *Lewis v. Sauvey*, 708 F. Supp. 167, 169 (E.D. Mich. 1989); *Apple v. Jewish Hosp. & Med. Ctr.*, 570 F. Supp. 1320, 1321-22 (E.D.N.Y. 1983); *Flickinger v. United States*, 523 F. Supp. 1372, 1374 (W.D. Pa. 1981). Accordingly, the FSHCAA makes the FTCA "the exclusive remedy for [tort] actions against members of the Public Health Service," and protects "employees of the Public Health Service from being subject to suit while performing medical and similar

(Continued on following page)

C. The Regulations for certifying an employee for FTCA coverage.

For an action to be covered by the Federal Torts Claims Act, an employee must first be certified by his employing Federal Agency to be a public employee working within the scope of his employment at the time of the incident. After certification is sent by the Federal Agency to the U.S. Attorney, the U.S. Attorney then proceeds to remove the case pursuant to 28 U.S.C. §2679.

Pursuant to both 28 U.S.C. §2679 and 42 U.S.C. §433, regulations concerning the certification process were promulgated at 28 C.F.R. §§15.1, 15.2 and 15.3. According to these regulations the first step in this process is the employee's PROMPT notification of the lawsuit to his supervisors. The regulation in effect on July 1, 2002 (which would have governed Dr. Khan's attempt for certification made in 2003) read as follows:

> (a) Any federal *EMPLOYEE* against whom a civil action or proceeding is brought for damages . . . for personal injury or death . . . on account of the employee's performance of medical care, . . . shall *PROMPTLY* deliver all process and pleadings served upon the employee . . . to the employees immediate supervisor . . . In addition, upon the employee's receipt of such process or pleadings . . . he shall *IMMEDIATELY* so advise his superior or the designee thereof by telephone or telegraph . . . (*emphasis added*)

28 C.F.R. §15.1 (7-01-02)

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functions by requiring that such suits be brought against the United States instead." *Cuoco v. Moritsugu*, 222 F.3d 99, 107, 108 (2d Cir.2000).

This regulation clearly places a burden on the ***employee*** to take PROMPT and IMMEDIATE action.

Thereafter, under §15.2 the employee's employing Federal agency shall submit a report as to whether the employee was acting within the scope of their employment at the time of the incident to the Branch Director of the Torts Branch, Civil Division, Department of Justice "at the earliest possible date or within such time as fixed by the U.S. Attorney upon request." Thereafter, the U.S. Attorney is authorized to make the certifications provided for in 28 U.S.C. §2679(d) [28 C.F.R. §15.3 (7-1-02)] and remove the case.

These regulations are consistent with the requirements of 28 U.S.C. §2679 and complement them. Where the statute requires of the employee that notification of suits be made *within the time allowed by the Attorney General*, the regulations are simply codification of the time limits set by the Attorney General (See Appendix to Part 15 – Civil Division Directive 90-77). These regulations represent a permissible construction of the statute and as such, they are enforceable and should be afforded deference by the Courts. See *Rust v. Sullivan*, 500 U.S. 1173, 111 S.Ct. 1759 (U.S. N.Y. 1991), *Chevron USA Inc. v. Natural Resources Defense*, 467 U.S. 837, 104 S.Ct. 2778 (1984), *Boeing v. U.S.*, 537 U.S. 437, 123 S.Ct. 1099 155 L.Ed.2d 17 (2003) and *Humanoids Group v. Rogan*, 375 F.3d 301 (4th Cir.2004) (where Lanham Act simply required registration of trademarks with the Patent and Trademark Office (PTO) and the PTO in turn set out the requirements for registration in regulations, the Court held that the requirements of the regulations must be followed).

D. "Promptly" means immediately or without delay.

Although the FTCA or the regulations do not define the term "promptly" for purposes of the statute, guidance is furnished by other sources. For example, a leading legal dictionary defines "forthwith" as follows: "1. Immediately; without delay. 2. Directly; promptly; within a reasonable time under the circumstances." BLACK'S LAW DICTIONARY (7th ed.1999). Likewise, the same dictionary defines "vigilance" thus: "Watchfulness; precaution; a proper degree of activity and promptness in pursuing one's rights, in guarding them from infraction, and in discovering opportunities for enforcing one's lawful claims and demands." *Id.*

In *Precision Special Metals Inc. v. United States*, 315 F.3d 1346 (Ca.Fed. 2003), the United States had asked for an extension of time to file an opposition to a summary judgment motion. On May 10, the Court denied the Motion for Extension of Time and ordered that the opposition be filed "forthwith". The United States did not file the Opposition until May 22 and the trial court struck the response. The United States asked for reconsideration. In the opinion is cited the definition of "forthwith" in BLACK'S LAW DICTIONARY 654 (6th ed.1990):

> Immediately; without delay; directly; within a reasonable time under the circumstances of the case; *promptly* and with reasonable dispatch, citing *U.S. ex rel. Carter v. Jennings,* D.C. Pa. 333 F. Supp. 1392, 1397; within such time as to permit that which is to be done, to be done lawfully and according to the practical and ordinary course of things to be performed or accomplished. The first opportunity offered.

In that opinion are cited various cases, including a Supreme Court case, *Dickerman v. Northern Trust Co.*, 176 U.S. 181, 20 S.Ct. 311 (1900) which said "forthwith" is usually construed as within 24 hours. (*Id.* at 193).

It is apparent that in this case Dr. Khan's conduct in waiting six years after service of process to report this suit to the United States was not "prompt" within the meaning of any reasonable construction of the regulatory language. Absent such prompt reporting of this suit to federal officials, the removal of this case under 28 U.S.C. §2679(d)(2) was improper.

E. Dr. Khan did not comply with 28 C.F.R. §15.1, and the Fifth Circuit's finding that compliance with the statute is sufficient is in error.

Dr. Khan waited six years to notify his supervisor or anyone with the United States of this action, which hardly qualifies as "promptness" for purposes of the FTCA and its implementing regulations. The regulations make it clear that the FTCA contemplates that removal of actions pursuant to 28 U.S.C. §2679(d) is conditional upon prompt notice by a federal employee to the United States of a pending tort action against that employee. This is the only interpretation of the regulation and statute that gives effect to all of its terms.

In this case, however, the Fifth Circuit held that compliance with the statute alone was sufficient and that the regulation that requires an employee's prompt action is not a condition precedent to removal. They cite no authority for this proposition, and cite only cases where the

employee had failed to seek certification altogether (see fn. 27 of Fifth Circuit Opinion, Appendix 1). Listed is *Combs v. United States*, 768 F. Supp. 584 (E.D. Ky. 1991) but there plaintiffs originated an administrative proceeding against the federal employee after settling with a non-federal employee in a state court case. The federal defendant there never asserted an FTCA defense and the Court found it had the authority to determine whether he was acting within the scope of his federal employment. This case is irrelevant to the facts of McLaurin since there was no issue of removal involved nor compliance with regulatory requirements as well as statutory requirements.

The Fifth Circuit also cited *Jones v. Littlejohn*, 474 S.E.2d 714 (Ga.Ct. App. 1996) and *Brennan v. Fatata*, 359 N.Y.S.2d 91 (N.Y.Sup. 1974) where plaintiffs sued in state court and the Defendants claimed FTCA immunity but had never reported the suits. These Courts found the total non-compliance meant that the state court suits could continue. However, both cases are factually irrelevant to the case at hand since in those cases, there was never any compliance. Here we had **belated compliance with the *statute*** and **blatant non compliance with the *regulations***.

The Fifth Circuit did cite the case of *Tassin v. Neneman*, 766 F. Supp. 974 (D. Kan 1991) in fn 27, but it failed to note that the Court there did deal with non-compliance with the regulations. The Defendant in *Tassin*, like the defendants in *Jones* and *Brennan*, was sued in state court and claimed FTCA immunity. Like the Courts in *Jones* and *Brennan*, the District Court in Kansas denied his Motion for Summary Judgment because the Defendant had failed to seek certification as a federal employee under the Act. Thus, the *Tassin* Court properly held that the employee, not

just his supervisor, has a requirement to act under the regulations "promptly", saying at fn. 1:

> The act requires the employee to deliver all process served upon him to his supervisors or other designated person and this must be done within the time determined by the Attorney General, which apparently means that the employee must "promptly" deliver the process, and "immediately" notify his superiors. See 28 C.F.R. §15.1.

Anticipating that the Defendant might then go, report the suit and become certified, the Court went further, however, and precluded the Defendant from even initiating the certification process at all because, it said, to allow him to do so at this late date (months after the suit was filed) would not constitute "prompt" notification to his superiors as required by 28 C.F.R. §15.1.

The regulations therefore make it clear that the statutory right of removal furnished thereunder is subject to the requirement that federal employees "promptly" report tort actions against them to their supervisors and ultimately to the U.S. Attorney. 28 C.F.R. §15.1 and 28 U.S.C. §2679(c). Thus, to read the statute, without the regulations, as requiring anything other than prompt reporting by the employee himself, is to ignore the regulatory requirement of prompt notification by the employee himself.

In this case, Dr. Khan's non-compliance with the regulations concerning the initiation of the certification process voids that process altogether and the removal should have been vacated.

II. EQUITABLE CONSIDERATIONS MANDATE REMAND.

Dr. Khan's certification and the subsequent removal of this after six years of litigation in state court should be vacated for equitable reasons. Many courts have held that the procedural requirements of the FTCA are to be construed in a manner consistent with traditional equitable principles. See *Motley v. United States*, 295 F.3d 820, 823-24 (8th Cir.2002) (addressing claim of tolling of statute of limitations in FTCA case); *Henderson v. United States*, 580 F. Supp. 1010, 1012-13 (D.D.C. 1983) (addressing claim of laches in FTCA case); *Kuhne v. United States*, 267 F. Supp. 649, 652 (E.D. Tenn. 1967) (same). See also *Shah v. Quinlin*, 901 F.2d 1241, 1243-44 (5th Cir.1990) (excusing requirement of exhaustion of administrative remedies in FTCA case on grounds of futility of pursuing such remedies). In *Reilly v. Peterson*, 435 F. Supp. 862 (S.D.N.Y. 1977), the court considered a claim that the United States had waived the right to remove an action to federal court pursuant to 28 U.S.C. §2679(d). In *Reilly*, an action brought in state court against a federal employee and her husband for injuries caused by an automobile accident was removed to federal court, whereupon the United States was substituted as the party defendant in the case. See 435 F. Supp. at 863-64. The plaintiff contended that the action should be remanded to state court to proceed against the individual defendants because their inequitable conduct, which prevented the disclosure of the role of the United States in the case, constituted a waiver of the right to invoke the provisions of 28 U.S.C. §2679(d). See 435 F. Supp. at 864. The court found on the facts of the case that there had been no waiver, given that within a month after the action was filed the defendant employee promptly notified her superiors of the action. See *id.*

Obviously, the facts of this case are quite different. As discussed, Dr. Khan waited six years, after this case already had proceeded to trial – albeit a trial that was interrupted by the state judge's unexpected recusal – to inform federal officials of this suit.[5]

It is important to note that the policy considerations underlying the FSHCAA do not obtain in this case. The basic purpose of the FSHCAA is to operate as de facto malpractice insurance for public health care providers, by extending to them the protections of the FTCA. See H.R. Rep. No. 104-398, at 4-8 (1995), *reprinted in* 1995 U.S.C.C.A.N. 767, 769-71 (setting forth legislative intent of FSHCAA). However, in this case the statutory purpose is irrelevant because, as noted, Dr. Khan has private malpractice insurance of his own. In other words, the language and purpose of the FTCA, as well as the equities of this case, point squarely to a finding that removal of this case was improper.

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[5] Although not applicable in this case, 28 U.S.C. §1446, which establishes a one-year deadline on removal of cases from state court based upon federal diversity jurisdiction, see 28 U.S.C. §§1332(a), 1446(b), reflects legislative concern with the problem of, as in this case, removal to federal court after very extensive proceedings in state court. See *Sheppard v. Wire Rope Corp.*, 777 F. Supp. 1285, 1289 (E.D. Va. 1991) ("The purpose of the one year bar [set out in 28 U.S.C. §1446] is to prevent removal where substantial progress on [a] case has been made in state court."); *Kite v. Richard Wolf Med. Instruments Corp.*, 761 F. Supp. 597, 599 (S.D. Ind. 1989) ("By incorporating the one (1) year limitation, Congress is preventing potential manipulation and forum shopping by defendants who are either attempting to delay proceedings by removing at the last second prior to trial, although removal was available earlier, or attempting to find a more friendly forum after substantial progress has been *made in the State forum*.").

It is worth noting that the Fifth Circuit has recognized in other contexts that it may be appropriate to examine the equities of a removal in a given case. In *Tedford v. Warner-Lambert Co.*, 327 F.3d 423 (5th Cir.2003), the Court considered the removal of a case in diversity jurisdiction, see 28 U.S.C. §1332, after the deadline on such removal created by 28 U.S.C. §1446(b). The Court found that the plaintiff's constant efforts to manipulate federal jurisdiction estopped the plaintiff to contest removal in diversity after the statutory deadline:

> The facts of this case [show that] . . . Tedford, a resident of Eastland County, filed a complaint with Castro in Johnson County, despite the fact that neither plaintiff could state a cognizable claim under Texas law against the sole nondiverse defendant. She amended her complaint to add her own physician hours after learning of Warner-Lambert's intent to remove. Then, Tedford signed and post-dated the Notice of Nonsuit of Dr. DeLuca prior to the expiration of the one-year period, but did not file the document with the court or notify Warner-Lambert until after the one-year anniversary of the filing of the complaint. Equity demands Tedford be estopped from seeking to remand the case on the basis of the one-year limit in §1466(b).

327 F.3d at 427-28. See also *Ardoin v. Stine Lumber Co.*, 298 F. Supp. 2d 422, 425-29 (W.D. La. 2003); *Brooks v. American Bankers Ins. Co. of Fla.*, No. CIV.A. 401CV00008-PB, 2003 WL 22037730, at *1 (N.D. Miss. Aug. 20, 2003).

Mrs. McLaurin fails to see why it is any more onerous or improper for a court to weigh the circumstances of a case removed under the FTCA to ascertain whether such removal was "prompt" than it is for a court to weigh the

circumstances of a removal in diversity to ascertain whether an equitable exception to 28 U.S.C. §1446(b) should apply. If anything, Mrs. McLaurin's position is stronger than that of the removing parties in *Tedford* because, as discussed, her position is based upon the express language of 28 U.S.C. §2679(c). See *Jones Mgmt. Servs., LLC v. KES, Inc.*, 296 F. Supp. 2d 892, 894 (E.D. Tenn. 2003) (rejecting *Tedford* as contrary to plain language of 28 U.S.C. §1446(b)); *Caudill v. Ford Motor Co.*, 271 F. Supp. 2d 1324, 1326-27 (N.D. Okla. 2003) (same); *Mantz v. St. Paul Fire & Marine Ins. Co.*, No. CIV.A. 2:03-0506, 2003 WL 21383830, at *2 (S.D.W.Va. June 13, 2003) (same), *modified*, 2003 WL 23109773 (S.D.W.Va. July 18, 2003).

The extremely untimely removal of this case is not consistent with the traditional equitable considerations that inform judicial construction of the FTCA. The District Court acknowledged as much when it termed the extremely belated removal of this case "troubling" (R. at 37), although the District Court concluded erroneously that it was constrained by the language of 28 U.S.C. §2679 to permit the removal. In fact this is false. As discussed supra, Dr. Khan's non-compliance with the certification regulations supports the conclusion that the removal of this case is improper.

CONCLUSION

To conclude, Dr. Khan failed to give timely notice of this case to the United States as required by 28 C.F.R. §15.1 (7-1-02) and thus, the certification should have been

denied and the removal vacated.[6] The Fifth Circuit's failure to enforce a critical regulation which imposed a requirement on the federal employee to promptly notify his supervisor prior to certification must be examined and corrected by this Court. To permit removal under the circumstances of this case is contrary to the law and, as the District Court recognized, extremely inequitable.

Respectfully submitted,

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[6] If review of the substantive aspects of certification (i.e., whether an employee was acting in the scope of his authority) is allowed, *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995); *Whytosek v. Rademan*, 903 F. Supp. 842 (E.D. Pa. 1995), then procedural aspects should also be reviewed.

APPENDIX

Page

1. Fifth Circuit Opinion affirming *Shirley McLaurin, et al. v. United States of America*, 392 F.3d 774 (5th Cir. Dec. 2, 2004).....App. 1

2. Order of U.S. District Judge Charles W. Pickering, *Shirley McLaurin, et al. v. United States of America*, February 11, 2004 (unreported) .....App. 17

3. Order of U.S. District Judge Charles W. Pickering, January 6, 2004 (unreported) .....App. 21

4. Fifth Circuit Order denying Appellant's Petition for Rehearing, January 7, 2005 (unreported) .....App. 22

5. Petitioners' Rule 28 Letter of November 8, 2004 concerning *Tassin v. Neneman*, 766 F. Supp. 974 (D. Kan 1991) .....App. 24

6. Petitioners' Rule 28 Letter of November 8, 2004 attaching Code of Federal Regulations, 28 Part 15, dated 7-01-02 .....App. 26

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60163

SHIRLEY McLAURIN,
Individually and on Behalf of the
Heirs of MILTON STUBBS, Deceased

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi

(Filed December 2, 2004)

Before REAVLEY, WIENER, and BENAVIDES, Circuit Judges.

WIENER, Circuit Judge:

Plaintiff-Appellant Shirley McLaurin ("McLaurin"), individually and on behalf of the heirs of Milton Stubbs, appeals the district court's denial of her motion to remand and the dismissal of her suit for failure to exhaust administrative remedies. The district court ruled that defendant-appellee United States of America (the "government") timely removed the suit and that McLaurin failed to

exhaust her administrative remedies under the Federal Tort Claims Act ("FTCA").[1] We affirm.

I. FACTS AND PROCEEDINGS

In January 1996, Milton Stubbs ("Stubbs") was taken to the emergency room at Forrest General Hospital ("FGH") in Hattiesburg, Mississippi, complaining of chest pain. As Stubbs was a patient of the Family Health Center ("Health Center")[2] in Sumrall, Mississippi, FGH called Dr. Saad Khan ("Khan"), who worked for the FHC, to treat Stubbs.

When Dr. Khan discovered that Stubbs had a condition that could inhibit blood clotting, he admitted Stubbs to FGH. During the night, Stubbs fell in the bathroom of his room. The next day, Khan noticed a bump on Stubbs's head but allegedly ordered no specific tests to assess the extent of the injury. Neither did Khan return to examine Stubbs before FGH discharged him that afternoon. The discharge papers, completed by FGH nurses, noted the bump on Stubbs's head, as well as a small puncture wound.

Two days later, Stubbs returned to FGH. Dr. Khan ordered a CAT scan because Stubbs appeared disoriented. The CAT scan revealed a subdural hematoma. Doctors performed surgery on Stubbs to stop the hematoma. Further bleeding occurred, however, and Stubbs died.

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[1] 28 U.S.C. § 2671, *et seq.*

[2] It is unclear from the record whether this entity is the Family Health Center or the Southeast Mississippi Rural Health Initiative, Inc. For purposes of this opinion, we refer to it as the "Health Center."

In November, McLaurin filed a wrongful death suit in state court against FGH, Khan, and three FGH nurses, on behalf of herself and Stubbs's heirs under Mississippi Code Annotated § 11-7-13. Dr. Khan retained counsel, and pretrial discovery began, during which Dr. Khan provided proof of private medical malpractice insurance coverage through St. Paul Insurance Company.

The case was set for trial against Dr. Khan on July 29, 2002.[3] On the eve of trial, the judge recognized Dr. Khan and recalled that he had once been a patient of Dr. Kahn. The judge offered to recuse himself if either party objected. McLaurin's counsel objected, and the judge recused himself.

The parties then attempted to set a trial date with the new judge to whom the case had been assigned. In August 2002, six years after McLaurin had filed suit, Dr. Khan notified the United States Department of Health and Human Services ("DHHS") of McLaurin's suit against him and requested that he (Dr. Khan) be certified as an employee of the United States on the grounds that the Health Center receives federal funds.[4] The DHHS reviewed the referral and determined that Dr. Khan was entitled to certification as a government employee. In October 2002, the DHHS referred the matter to the United States Attorney for the Southern District of Mississippi.

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[3] FGH settled with McLaurin before trial, and the state court dismissed the FGH nurses before trial under the Mississippi Tort Claims Act.

[4] The DHHS had deemed the Health Center as an entity eligible for medical malpractice coverage under the FTCA. *See* 42 U.S.C. § 233(h).

In February 2003, the government certified that Dr. Khan was acting within the scope of his office or employment at the time of the Stubbs incident and removed the case to the district court under 29 U.S.C. § 2679(d)(2). The government then filed a Notice of Substitution and Motion to Amend Caption of Case under Section 2679(d)(2), seeking to substitute the government as the proper party defendant with respect to the claims against Dr. Khan. The district court granted the motion, substituted the government as the proper party defendant, and dismissed Dr. Khan with prejudice.

In March 2003, McLaurin filed a Motion to Remand, in which she asserted that Dr. Khan had waived his right to removal under Section 2679(d)(2) by failing to furnish the government prompt notice of the suit. In April, the government filed a Motion to Dismiss for failure to exhaust administrative remedies. After two hearings on the motions, the district court denied McLaurin's motion to remand and granted the government's motion to dismiss without prejudice for lack of subject matter jurisdiction, based on McLaurin's failure to exhaust her administrative remedies under the FTCA. McLaurin timely filed her notice of appeal.

II. ANALYSIS

A. Standard of Review

We review *de novo* a district court's denial of a motion to remand.[5]

B. The FTCA

Section 2679 of the FTCA provides that a suit against the United States is the exclusive remedy for damages for injury or loss of property "resulting from the negligent or wrongful conduct of any employee of the Government while acting within the scope of his office or employment."[6] The Federally Supported Health Centers Assistance Act of 1995 ("FSHCAA") extends FTCA coverage to employees of the Public Health Service ("PHS"). Under the FSHCAA, the PHS may deem employees of qualified and eligible community health care centers as government employees entitled to immunity under the FTCA.[7] Once the PHS deems an employee of a qualified community health care center to be a PHS employee, the employee enjoys absolute immunity from common law tort claims, and an injured party's exclusive remedy is against the government under the FTCA.[8] In short, the FSHCAA makes the FTCA the exclusive remedy for actions against employees of the PHS "resulting from the performance of medical . . . or related

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[5] *Garcia v. Koch Oil Co. of Texas, Inc.*, 351 F.3d 636, 638 (5th Cir. 2003). McLaurin does not dispute that she failed to exhaust her administrative remedies under the FTCA.

[6] 28 U.S.C. § 2679(b)(1).

[7] 42 U.S.C. § 233(g)(1)(A) & (G).

[8] *See id.* § 233(g)(1)(A).

functions"[9] and "protects commissioned officers or employees of the [PHS] from being subject to suit while performing medical and similar functions by requiring that such lawsuits be brought against the United States instead."[10]

Once the PHS deems the employee a federal employee, the government must determine whether the "employee was acting within the scope of his office or employment at the time out of which the incident arose," and must so certify if the employee is found to have been thus acting.[11] If scope certification is made, the FTCA allows the government to remove the suit against the employee to federal court and substitute the government as the proper party defendant.[12] The dispute here concerns whether the government timely removed this action to federal court under Section 2679. McLaurin does not challenge the government's determination that the Health Center is a qualified community health care center or that Dr. Khan – as an employee of the Health Center – is a federal employee for purposes of Section 2679. Neither does McLaurin dispute that Dr. Khan was acting within the course and scope of his employment at the time of the incidents alleged in her complaint. Her sole complaint is timeliness.

McLaurin argues that the government waived its right to removal because Dr. Khan failed to notify it promptly of McLaurin's suit against him. McLaurin cites to Section 2679(c) as support for this proposition:

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[9] *See id.* § 233(a).

[10] *Cuoco v. Moritsugu*, 222 F.3d 99, 108 (2d Cir. 2000).

[11] 28 U.S.C. § 2679(d)(1)-(3).

[12] *Id.* § 2679(d)(1)-(2).

> The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service *as determined by the Attorney General*, all process served upon him . . . to his immediate superior . . . *and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney* for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.[13]

McLaurin argues that because Section 2679(c) requires that a federal employee "promptly furnish copies of the pleadings and process" to the government, and because Dr. Khan failed to do so, he – and thus the government – waived the right to remove this suit to federal court. In effect, McLaurin argues that Section 2679(c) is a condition precedent to removal under Section 2679(d)(2).

The government counters with the argument that Section 2679(d)(2) merely requires removal "before trial." The government relies on the language of Section 2679(d)(2):

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court *shall be removed* without

[13] 28 U.S.C. § 2679(c) (emphasis added).

> bond *at any time before trial* by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provision of this title and all references thereto, and the United States shall be substituted as the party defendant. *This certification of the Attorney General shall conclusively establish scope or office of employment for purposes of removal.*[14]

Similarly, the government notes that the FSHCAA provides that "any such civil action or proceeding commenced in a State court shall be removed without bond *at any time before trial*. . . ."[15] The government contends that because it removed this matter before trial, it fulfilled the only statutory prerequisite to removal.

The unambiguous language of Section 2679(d)(2) requires only that the government remove "before trial" a suit in which the PHS has deemed a qualified health care center employee as a federal employee.[16] Congress has placed no other time limitation or requirement on removal in a suit under Section 2679.[17] "[T]he starting point in

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[14] *See id.* § 2679(d)(2) (emphasis added).

[15] 42 U.S.C. § 233(c) (emphasis added).

[16] 28 U.S.C. § 2679(d)(2).

[17] *See, e.g., Sullivan v. United States*, 21 F.3d 198, 205-06 (7th Cir. 1994) (noting that "at any time before trial" is only temporal limitation on certification procedure and that "we believe it would be unfair in these circumstances to impose a deadline for section 2679(c) notice that the Act itself does not impose."); *Guerrero v. Alivio Med. Ctr., Inc.*, No. 03 C 2492, 2003 WL 21688240, at *1 (N.D. Ill.) (noting that requirement under 28 U.S.C. § 1446(b) that defendant file removal notice

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every case involving construction of a statute is the language itself."[18] Indeed, "Congress is not to be presumed to have used words for no purpose."[19] Congress explicitly allows removal under Section 2679(d)(2) to occur "at any time before trial."[20]

McLaurin asserts that to interpret the statute to allow removal at any time before trial is to read the word "promptly" out of Section 2679(c). This is not so. It is true that Dr. Khan failed to deliver the suit papers to his supervisor immediately. It is also true, however, that – in the statute – "promptly" modifies the actions that the *supervisor* must take when he delivers the suit papers to the government.[21] It is the *supervisor*, not the *employee*, who must "promptly" deliver the suit papers to the government. As the government correctly notes, the statute

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within thirty days of receipt of initial pleading does not apply to suits removed under Section 2679(d)(2) because suit may be removed "at any time before trial"); *Perry v. United States*, 936 F. Supp. 867, 878 (S.D. Ala. 1996) ("The FTCA . . . states that the United States may remove a case at any time before trial; there are no other requirements for or limitations on the removal of a case under § 2679(d)(2)"); *Wilson v. Jones*, 902 F. Supp. 673, 677-78 (E.D. Va. 1995) (finding that removal was timely because "the state proceeding ha[d] not gone to trial"); *Kizer v. Sherwood*, 311 F. Supp. 809, 811 (M.D. Pa. 1970) (finding that removal under Section 2679 was timely even after entry of default judgment in state court because parties could still proceed to trial on damages and such trial had not yet begun).

[18] *United States v. Mathena*, 23 F.3d 87, 91 (5th Cir. 1994) (quoting *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978)).

[19] *Platt v. Union Pac. R.R. Co.*, 99 U.S. 48, 58 (1878).

[20] Although McLaurin and Dr. Khan were on the eve of trial when the original state judge recused himself, the government removed this suit and moved to dismiss McLaurin's complaint for failure to exhaust before the parties proceeded to trial in state district court.

[21] *See* 28 U.S.C. § 2679(c).

mandates only that "the employee . . . deliver within such time after date of service or knowledge of service as *determined by the Attorney General*, all process served upon him" to his supervisor or the person designated to receive such paperwork.[22] This language authorizes the government to determine the time within which the employee must deliver the suit papers to his supervisor.

McLaurin correctly notes that 28 C.F.R. § 15.1 requires the employee to deliver the suit papers promptly to his supervisor. Section 15.1 provides:

> Any Federal employee against whom a civil action or proceeding is brought for damages . . . on account of the employee's performance of medical care, treatment, or investigation in the scope of his office or employment . . . shall *promptly* deliver all process and pleadings served upon the employee . . . to the employee's immediate superior . . . In addition, upon the employee's receipt of such process or pleadings, or any prior information regarding the commencement of such a civil action or proceedings, he shall *immediately* so advise his superior or the designee thereof by telephone or telegraph.[23]

We conclude, though, that the statutory and regulatory provisions on timeliness – the use of the term "promptly" in both Sections 2679(c) and 15.1 – do not inure to the benefit of tort plaintiffs but to the benefit of the government, which, under both provisions, waives its sovereign immunity and runs the risk of incurring a judgment once it certifies the employee as a federal employee. As the

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[22] *Id.*

[23] 28 C.F.R. § 15.1(a).

FTCA is a waiver of the government's sovereign immunity, we must strictly construe the statute; any ambiguities will be resolved in favor of the sovereign.[24] There is nothing in the statute or the regulation to indicate that the "prompt" delivery requirement is a condition precedent to removal or that, absent a "prompt" delivery, the government waives its right to removal. Further, our conclusion that the statutory requirements inure to the government's benefit is buttressed by the language in Section 2679(c), which allows the *Attorney General* to determine the time within which the employee must deliver the suit papers to the government.[25] Accordingly, we construe the statute as urged by the government and rule that the "prompt" delivery requirement inures to its benefit, and not that of the plaintiff.[26] The district court did not err when it concluded that

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[24] *See Lane v. Pena*, 518 U.S. 187, 192 (1996); *Leleux v. United States*, 178 F.3d 750, 754 (5th Cir. 1999); *Linkous v. United States*, 142 F.3d 271, 275 (5th Cir. 1998).

[25] 28 U.S.C. § 1679(c) ("The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service *as determined by the Attorney General*, all process served upon him. . . .").

[26] McLaurin also appears to argue that Dr. Khan waived entitlement to FTCA coverage by not "promptly" delivering the suit papers to either his employer or the government. Several courts have discussed whether a federal-employee defendant waives entitlement to coverage under the FTCA by failing to satisfy conditions precedent to coverage under Section 2679. Federal and state courts that have addressed this issue routinely hold that a defendant waives entitlement to coverage under the FTCA only if he *completely* fails to comply with the provisions of Section 2679(c). *See, e.g., Combs v. United States*, 768 F. Supp. 584, 592 (E.D. Ky. 1991) (noting that because defendant and his insurer failed to assert Section 2679 defenses or deliver suit papers to Government, plaintiffs could recover against defendant personally as well as against United States under theory of respondeat superior); *Tassin v. Neneman*, 766 F. Supp. 974, 976-77 (D. Kan. 1991) (noting that because defendant failed to deliver process and pleadings to attorney general

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the government timely removed this suit under Section 2679(d)(2).[27]

C. Private Medical Malpractice Insurance

McLaurin also argues that Dr. Khan waived entitlement to coverage under the FTCA because he is covered by private medical malpractice insurance. McLaurin notes that the basic purpose of the FSHCAA is to extend the coverage protections of the FTCA to public health care providers by operating as their de facto medical insurer.[28]

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and to obtain attorney general certification, "the defendant has failed to satisfy the statutory prerequisites, in effect waiving the immunity granted by the Act, and therefore the immunity defense is invalid."); *Jones v. Littlejohn*, 474 S.E.2d 714, 715-16 (Ga. Ct. App. 1996) (noting that because the defendant failed to deliver suit papers to supervisor and failed to obtain Government certification, exclusivity provision not triggered, and state court retained jurisdiction over suit); *Brennan v. Fatata*, 78 Misc.2d 966, 967, 359 N.Y.S.2d 91, 92 ("If the defendants are to obtain the benefits of the Federal preemption of section [2679], they must follow its provisions by turning suit papers over to the United States Attorney General . . . who will then certify the scope of Federal employment and the action will be removed to Federal court . . . It is implicit in the statute that if the defendants do not turn over their suit papers . . . the State action continues against the defendants personally."). These cases are inapposite. In them, the defendants failed completely to follow the procedural framework under Section 2679 to obtain coverage/immunity under the FTCA. Here, Dr. Khan delivered the suit papers to the government – albeit eventually – and the government certified Dr. Khan as acting within the scope of employment.

[27] Indeed, we have previously held that *remand is not even permitted* once the government certifies the scope of employment and removes the suit under Section 2679(d)(2). *See Garcia v. United States*, 88 F.3d 318, 322 (5th Cir. 1996).

[28] *See* H.R. REP. NO. 104-398, at 4-8 (1995), *reprinted in* 1995 U.S.C.C.A.N. 767, 769-71 (providing legislative intent of FSHCAA); *see also* H.R. Rep. No. 102-823(II), at 6 (1992) (providing that FTCA

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McLaurin argues that Dr. Khan's coverage by private medical malpractice insurance amounts to a waiver of FTCA coverage because it undermines the statutory purpose of the FSHCAA. McLaurin cites to no authority to support this imaginative argument.

That the purchase of private medical malpractice insurance is a waiver of FTCA coverage is belied by the explicit language of the FSHCAA itself. Section 233(g)(2) provides that

> [i]f, with respect to an entity or person deemed to be an employee for purposes of paragraph (1), a cause of action is instituted against the United States pursuant to this section, any claim of the entity or person for benefits under an insurance policy with respect to medical malpractice relating to such cause of action shall be subrogated to the United States.[29]

The FSHCAA thus envisions that a physician might be covered by private medical malpractice insurance even though the PHS might, at some point, deem him to be a federal employee for purposes of the FTCA. Indeed, under the explicit language of Section 233(g)(2), the benefits of private medical malpractice insurance inures to the government's benefit because the government is subrogated to any rights that Dr. Khan may have to recover from St. Paul Insurance Company. To find that a medical practitioner such as Dr. Khan cannot obtain private medical malpractice insurance – or, in so doing, waives

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coverage extended to allow federally funded health care centers to "redirect funds now spent on malpractice insurance premiums toward improving or expanding their services to their target populations.").

[29] 42 U.S.C. § 233(g)(2).

entitlement to coverage under the FTCA – would detrimentally affect those practitioners who work at federally-funded institutions. If a medical practitioner such as Dr. Khan cannot obtain private medical malpractice insurance, he practices medicine at his own risk, because the PHS will not deem a physician a federal employee *until after suit is filed against him*.[30] We reject this argument.

D. Equitable Considerations

Finally, McLaurin insists that the "extremely untimely removal of this case is not consistent with the traditional equitable considerations that inform judicial construction of the FTCA." She notes that circuit and district courts have applied equitable doctrines to the FTCA.[31] McLaurin thus argues that equitable considerations require remand here because of the government's unpardonable dilatoriness.

We do not agree that equitable considerations require remand in this instance. The FTCA imposes a two-year

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[30] *See El Rio Santa Cruz Neighborhood Health Ctr. v. Dep't of Health & Human Servs.*, 300 F. Supp. 2d 32, 37 n. 4 (D.D.C. 2004) ("Though not directly at issue in this lawsuit, this policy [of deeming a physician a federal employee within 30 days of receipt of the application] contributed, if not created, the problem plaintiffs now face, and completely undermines the purpose of the Act, since the contractors/physicians *cannot know if they are covered until after they are sued*, and thus, they proceed at their own risk if they forego obtaining their own malpractice insurance." (emphasis added)).

[31] *See, e.g., Motley v. United States*, 295 F.3d 820, 823-24 (8th Cir. 2002) ("We apply the doctrine of equitable tolling to FTCA claims against the government."); *Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999) (noting that equitable tolling applies in FTCA cases).

statute of limitations on suits against the government.[32] Nevertheless, Congress has provided that a plaintiff whose case is dismissed without prejudice for failure to exhaust administrative remedies may file an administrative claim within 60 days following dismissal.[33] This provision "insures [sic] that a plaintiff . . . , though no doubt inconvenienced, will not be prejudiced by her failure to first file an administrative claim with the appropriate federal agency within the two-year time period."[34]

Stubbs died in January 1996. McLaurin sued Dr. Khan in November, well within the two-year statute of limitations. Her administrative claim would therefore have been timely had she filed it in November 1996. The district court dismissed McLaurin's suit without prejudice. If McLaurin files an administrative claim within 60 days of dismissal, it will be timely. Although we are not indifferent to McLaurin's frustration, we are satisfied that Congress has provided plaintiffs such as McLaurin an

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[32] 28 U.S.C. § 2401(b) ("A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues. . . .").

[33] *See* 28 U.S.C. § 2679(d)(5)(A)-(B) ("Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if . . . the claim would have been timely had it been filed on the date the underlying civil action was commenced, and the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.").

[34] *Warren v. Joyner*, 996 F. Supp. 581, 584 (S.D. Miss. 1997); *see also Jackson v. United States*, 789 F. Supp. 1109 (D. Colo. 1992) (refusing to waive filing of administrative claim because procedures established by FTCA constitute waiver of sovereign immunity and must therefore be strictly construed).

adequate remedy. Equitable considerations do not warrant remand here.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is, in all respects,

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

SHIRLEY McLAUREN	**PLAINTIFF**
VERSUS	**CIVIL ACTION NO. 2:03cv90pg**
UNITED STATES OF AMERICA	**DEFENDANT**

ORDER

(Filed Feb. 11, 2004)

This case comes before the Court on Plaintiff's Motion to Remand and Defendant's Motion to Dismiss without prejudice for failure to exhaust administrative remedies under the Federal Torts Claim Act.

The Court gave consideration as to whether this case should have been remanded due to laches and equitable estoppel. However, Plaintiff has cited no authority that would justify the Court so ruling. Although not on point the case of *Motley v. U.S.*, 295 F.3d 820 (8th Cir. 2002) is somewhat analogous.

This Court is gravely concerned that Defendant would wait six and one-half years to remove this case. To this Court this is totally unfair. Nevertheless, it is up to Congress, and not the Courts, to determine public policy. The language of 28 U.S.C. § 2679(d)(2) is not ambiguous.

Since the certification of the U.S. Attorney on the question of removal is conclusive under 28 U.S.C. § 2679(d)(2), *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 419-20 (1995); and *Garcia v. U.S.*, 88 F.3d 318, 324 (5th Cir. 1996), Plaintiffs Motion to Remand is denied.

Since Plaintiff cannot proceed further in this matter without filing a claim under the Federal Torts Claim Act, this matter will be dismissed so that Plaintiff can make an administrative filing. A separate Judgment will be entered in accordance with this Order.

SO ORDERED AND ADJUDGED, this the 11th day of Feb., 2004.

/s/ Charles W. Pickering
CHARLES W. PICKERING, SR.
Circuit Judge, Sitting By
Designation

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

SHIRLEY McLAUREN	**PLAINTIFF**
VERSUS	**CIVIL ACTION NO. 2:03cv90PG**
UNITED STATES OF AMERICA	**DEFENDANT**

JUDGMENT

(Filed Feb. 11, 2004)

This day this cause came before the Court on Plaintiff's Motion to Remand and Defendant's Motion to Dismiss without prejudice for failure to exhaust administrative remedies under the Federal Torts Claim Act. The decision having been duly rendered by separate Order;

It is Ordered and Adjudged:

That Plaintiff's Motion to Remand is denied. Since Plaintiff cannot proceed further in this matter without filing a claim under the Federal Torts Claim Act, this matter will be dismissed without prejudice so that Plaintiff can make an administrative filing.

Any other pending motions are dismissed as moot.

SO ORDERED AND ADJUDGED, this the 11th day of Feb., 2004.

/s/ Charles W. Pickering
CHARLES W. PICKERING, SR.
Circuit Judge, Sitting By
Designation

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

SHIRLEY McLAURIN ET AL	**PLAINTIFFS**
VERSUS	**CIVIL ACTION NO. 2:03cv90PG**
UNITED STATES OF AMERICA	**DEFENDANT**

ORDER

(Filed Jan. 6, 2004)

This matter is before the Court on January 15, 2004, for hearing on Plaintiffs' Motion to Remand and Defendant's Motion to Dismiss. The matter will be held in abeyance for 10 days to permit settlement negotiations. At the conclusion of 10 days, if the case has not settled, the Court will enter an Order on the pending motions based on the issues and arguments that were discussed at the motion hearing.

SO ORDERED on this, the 6th day of January, 2004.

/s/ Charles W. Pickering
CHARLES W. PICKERING, SR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60163

SHIRLEY MCLAURIN, Individually and On Behalf of the heirs of Milton Stubbs, deceased

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA

Defendant - Appellee

Appeal from the United States District Court for the Southern District of Mississippi, Hattiesburg

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ON PETITION FOR REHEARING AND REHEARING EN BANC

(Filed Jan. 7, 2005)

(Opinion 12/02/04, S. Cir., ___, ___ F.3d ___)

Before REAVLEY, WIENER and BENAVIDES, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on

Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 34) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

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November 8, 2004

Mr. Charles R. Fulbruge III, Clerk
United States Court of Appeals for the Fifth Circuit
600 Camp St.
New Orleans, LA 70130

Re: *Shirley McLaurin v. United States of America*
No. 04-60163

Dear Sir:

Pursuant to FRAP 28(j), enclosed please find a copy of *Tassin v. Henneman*, 766 F. Supp. 974 (D. Kan. 1991) that was noted for the court during argument but not raised previously in Appellant's brief..

This case involved a vehicle/pedestrian accident on a military base. The pedestrian who later died sued the Defendant Army lieutenant for his injuries. Neneman claimed federal immunity under the Federal Drivers Act (the predecessor to the Westfall Act) and filed a Motion for Summary Judgment on that basis. The District Court in

Kansas denied the Motion for Summary Judgment because Lt. Neneman had failed to seek certification as a federal employee under the Act. The Court went further and precluded the Defendant from then seeking it at all because the Defendant not just his supervisors) had not sought certification *promptly*. Specifically, the Court cited what is 28 USC 2679(c) (which is the language the US in this case says only puts a responsibility on the supervisor to act promptly) and then goes on to say in [FN 1]:

> The act requires the employee to deliver all process served upon him to his supervisors or other designated person and this must be done within the time determined by the Attorney General, which apparently means that the employee must "promptly" deliver the process, and "immediately" notify his superiors. See 28 CFR 15.1.

Appellant McLaurin believes this Court should use the same reasoning and rule that Dr. Khan had an obligation to promptly seek certification, and that because of his failure to do so, the United State's certification should be voided, removal ruled as improper and the case remanded. In the very least, the certification and substitution should be voided. Dr. Khan reinstated individually, and a ruling made that this is not a FTCA case.

Sincerely,

/s/ Suzanne Keys
Suzanne Keys
Counsel for Plaintiff-Appellant Shirley McLaurin

Enclosure

cc: All counsel of record

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November 8, 2004

Mr. Charles R. Fulbruge III, Clerk
United States Court of Appeals for the Fifth Circuit
600 Camp St.
New Orleans, LA 70130

Re: *Shirley McLaurin v. United States of America*
No. 04-60163

Dear Sir:

Pursuant to FRAP 28(j) enclosed please find a copy of the Code of Federal Regulations, 28 Part 15, dated 7-01-02 that Appellants referred to in our argument of the above named case. The CFR citation that appeared in the brief was downloaded from Westlaw and apparently the regulation has changed since 2002. We believe the attached Regulation would have been the one that Dr. Khan was subject to when he sought certification as a federal employee in August 2002.

While the FTCA [28 USC 2679(c)] does put a responsibility on an employee's supervisor to notify the Attorney General promptly of any lawsuit, these regulations clearly place the burden on the *employee* to notify his supervisor of a suit **promptly** as well. He is to send the paperwork promptly and he is to telephone or telegraph his supervisor as well.

We contend that these regulations obligated. Dr. Khan to notify DHHS promptly of this lawsuit, and that by failing to do so, he waived his right to seek certification; that the certification is therefore void and the removal improper and remand is warranted. Should the Court feel that it cannot remand the case, in the very least it should vacate the certification and substitution of the United States, thereby ruling that this case is not subject to the FTCA, reinstate Dr. Khan as an individual defendant and let us proceed to trial.

Sincerely,

/s/ Suzanne Keys
Suzanne Keys
Counsel for Plaintiff-Appellant Shirley McLaurin

PART 15 – DEFENSE OF CERTAIN SUITS AGAINST FEDERAL EMPLOYEES: CERTIFICATION AND DEFENSE OF CERTAIN SUITS AGAINST PROGRAM PARTICIPANTS UNDER THE NATIONAL SWINE FLUE IMMUNIZATION PROGRAM OF 1976, AND CERTIFICATION AND DECERTIFICATION OF CERTAIN SUITS BASED UPON ACTS OR OMISSIONS OF CONTRACTORS IN CARRYING OUT AN ATOMIC WEAPONS TESTING PROGRAM UNDER A CONTRACT WITH THE UNITED STATES

Sec.

15.1 Expeditious delivery of process and pleadings.

15.2 Providing data bearing upon scope of employment or program participant status.

15.3 Removal and defense of suits.

APPENDIX TO PART 15

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 1089; 22 U.S.C. 817; 28 U.S.C. 509, 510 and 2679; 38 U.S.C. 4116; 42 U.S.C. 233, 247b and 2458a, and the Department of Defense Authorization Act of 1985.

CROSS REFERENCE: For Organization Statement, Civil Division, see subpart I of part O of this chapter.

§ 15.1 Expeditious delivery of process and pleadings.

(a) Any Federal employee against whom a civil action or proceeding is brought for damages to property, or for personal injury or death, on account of the employee's operation of a motor vehicle in the scope of his office or employment with the Federal Government or on account

of the employee's performance of medical care, treatment, or investigation in the scope of his office or employment with the Public Health Service or the Veterans Administration Department of Medicine and Surgery, the Department of State (including the Agency for International Development), the Armed Forces, the Department of Defense, the Central Intelligence Agency, or the National Aeronautics and Space Administration shall promptly deliver all process and pleadings served upon the employee, or an attested true copy thereof, to the employee's immediate superior or to whoever is designated by the head of the employee's department or agency to receive such papers. If the action is brought against an employee's estate this procedure shall apply to the employee's personal representative. In addition, upon the employee's receipt of such process or pleadings, or any prior information regarding the commencement of such a civil action or proceeding, he shall immediately so advise his superior or the designee thereof by telephone or telegraph. The superior or designee shall furnish the U.S. Attorney for the district embracing the place wherein the action or proceeding is brought and the Branch Director of the Torts Branch, Civil Division, Department of Justice, information concerning the commencement of such action or proceeding, and copies of all process and pleadings therein.

(b) Any program participant as that term is defined in 42 U.S.C. 247b(k)(2)(B) against whom a civil action or proceeding is brought for damages for personal injury or wrongful death on account of the administration of swine flu vaccine under the National Swine Flu Immunization Program of 1976 (or the personal representative or successor of such program participant, if the action is brought against the estate or successor of such program participant) shall

promptly deliver all process and pleadings served upon such program participant, or an attested true copy thereof, to the Branch Director, Torts Branch, Civil Division, U.S. Department of Justice, Washington, DC 20530, and to the Department Claims Officer, Office of the General Counsel, Department of Health, Education and Welfare, Washington, DC 20201. The Branch Director shall promptly furnish copies of the papers to the U.S. Attorney for the district embracing the place wherein the action or proceeding is brought.

(c) Any person against whom an action for injury, loss of property, personal injury, or death has been brought due to exposure to radiation based on acts or omissions by a contractor, as defined in section 1631(d) of the Department of Defense Authorization Act of 1985, in carrying out an atomic weapons testing program under a contract with the United States, shall promptly deliver all process and pleadings served upon such person, or an attested true copy thereof, to the Branch Director, Torts Branch, Civil Division, U.S. Department of Justice, Washington, DC 20530.

[42 FR 15409, Mar. 22, 1977; 42 FR 17111, Mar. 31, 1977, as amended at 46 FR 52355, Oct. 27, 1981; Order No. 1074-84, 49 FR 44995, Nov. 14, 1984]

§ 15.2 Providing data bearing upon scope of employment or program participant status.

(a) The employee's employing Federal agency shall submit a report containing all data bearing upon the question whether the employee was acting within the scope of his office or employment with the Federal Government, at the time of the incident out of which the suit

arose, to the United States Attorney for the district embracing the place wherein the civil action or proceeding is brought, with a copy of the report to the Branch Director of the Torts Branch, Civil Division, Department of Justice, at the earliest possible date, or within such time as shall be fixed by the U.S. Attorney upon request.

(b) A program participant as that term is defined in 42 U.S.C. 247b(k)(2)(B) shall deliver all information in the participant's possession or reasonably available to the participant concerning the participant's status as a program participant to the Branch Director, Torts Branch, Civil Division, U.S. Department of Justice, Washington, DC 20530, upon request and within such time as shall be fixed.

(c) A person against whom an action has been brought for injury, loss of property, personal injury, or death due to exposure to radiation based on acts or omissions by a contractor, as defined in section 1631(d) of the Department of Defense Authorization Act of 1985, in carrying out an atomic weapons testing program under a contract with the United States, shall deliver all information in the person's possession or reasonably available to the person concerning (1) the person's status as a contractor within the meaning of section 1631(d) of the Department of Defense Authorization Act of 1985; (2) the relation, if any, of the civil action or injury, loss of property, personal injury, or death due to exposure to radiation to acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States; and (3) the subject matter of the action to the Branch Director, Torts Branch, Civil Division, U.S. Department of Justice, Washington, DC 20530, upon request within such time as shall be fixed and shall cooperate with

the Justice Department in defense of said action upon request following certification of an action pursuant to section 1631(b) of the Department of Defense Authorization Act of 1985.

[Order No. 254-61, 26 FR 11420, Dec. 2, 1961, as amended at 42 FR 15410, Mar. 22, 1977; Order No. 960-81, 46 FR 52355, Oct. 27, 1981; Order No. 1074-84, 49 FR 44995, Nov. 14, 1984]

§ 15.3 Removal and defense of suits.

(a) The U.S. Attorneys are authorized to make the certifications provided for in 10 U.S.C. 1089(c), 22 U.S.C. 817(c), 28 U.S.C. 2679(d), 38 U.S.C. 4116(c), and 42 U.S.C. 233(c) and 2458a(c) with respect to civil actions or proceedings brought against Federal employees in their respective districts. Such a certification may be withdrawn if a further evaluation of the relevant facts or the consideration of new or additional evidence calls for such action. The making, withholding, or withdrawing of certifications, and the removal and defense of, or the refusal to remove and defend, such civil actions or proceedings by the U.S. Attorneys shall be subject to the instructions and supervision of the Assistant Attorney General in charge of the Civil Division.

(b) The Assistant Attorney General in charge of the Civil Division is authorized:

(1) To make the certification provided for in 42 U.S.C. 247b(k)(5) with respect to civil actions or proceedings brought against program participants in various courts of law;

(2) To withdraw that certification if further evaluation of the relevant facts or the consideration of new or additional evidence calls for such action;

(3) To move to revoke such certification pursuant to 42 U.S.C. 247b(k)(6) should the facts warrant; and

(4) To redelegate to subordinate division officials the authority delegated by this paragraph, provided that such redelegation shall be in writing and shall be approved by the Associate Attorney General before becoming effective.

(c) The Assistant Attorney General in charge of the Civil Division is authorized:

(1) To make the certification provided for in section 1631(b) of the Department of Defense Authorization Act of 1985, with respect to civil actions or proceedings brought against persons for injury, loss of property, personal injury or death due to exposure to radiation based on acts or omissions by a contractor, as defined in section 1631(d) of the Department of Defense Authorization Act of 1985, in carrying out an atomic weapons testing program under a contract with the United States in any court or other tribunal;

(2) To withdraw that certification if further evaluation of the relevant facts or the consideration of new or additional information calls for such action, in the exercise of his sole discretion; and

(3) To redelegate to subordinate Division officials the authority delegated by this paragraph, provided that such redelegation shall be in writing and shall be approved by me before becoming effective.

[42 FR 15410, Mar. 22, 1977, as amended by Order No. 1074-84, 49 FR 44995, Nov. 14, 1984]

APPENDIX TO PART 15

CIVIL DIVISION

[Directive No. 90-77]

EDITORIAL NOTE: At 44 FR 9379, Feb. 13, 1979, Civil Division, Directive No. 90-77 was revoked.

DELEGATION OF AUTHORITY OF THE ASSISTANT ATTORNEY GENERAL OF THE CIVIL DIVISION TO MAKE CERTIFICATIONS, TO WITHDRAW CERTIFICATIONS, AND TO FILE APPROPRIATE MOTIONS

CIVIL DIVISION

[Directive No. 90-79]

1. By virtue of the authority vested in me by part 15 of title 28 of the Code of Federal Regulations, particularly § 15.3(b), it is hereby ordered as follows:

2. The authority delegated to the Assistant Attorney General in charge of the Civil Division to make the certifications provided for in 10 U.S.C. 1089(c), 22 U.S.C. 817(c), 28 U.S.C. 2679(d), 38 U.S.C. 4116(c), and 42 U.S.C. 233(c) and 2458a(c) with respect to civil actions or proceedings brought against Federal employees and to certify the status of program participants under the National Swine Flu Immunization Program of 1976, as that term is defined in 42 U.S.C. 247b(k)(2)(B), and as required under 42 U.S.C. 247b(k)(4)-(5), is hereby delegated to any Deputy Assistant Attorney General of the Civil Division and to any Director of the Torts Branch, any one of whom may

individually exercise the authority in any given instance. This delegation also includes the authority to withdraw the certification and file appropriate motions as set forth in §15.3(b) of title 28 of the Code of Federal Regulations.

3. Civil Division Directive No. 90-77 is hereby revoked.

[44 FR 9379, Feb. 13, 1979]